



July 3, 2002

Mr. Jose R. Guerrero
Montalvo & Ramirez
900 East Main
McAllen, Texas 78501

OR2002-3618

Dear Mr. Guerrero:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 165232.

The La Joya Independent School District (the "district"), which you represent, received a written request from an attorney for information in connection with allegations that the requestor's client sexually harassed a female subordinate. The information request is in the form of interrogatories and a "Plaintiff's Request to La Joya I.S.D. for Production of Documents." You state that some responsive information will be released to the requestor. You state, however, that some of the requested information, including records pertaining to the investigation of the allegations, do not exist.¹ You contend that the district is not required to respond to the interrogatories and that two categories of requested records, an employee's personnel file and employment application, are excepted from required public disclosure pursuant to section 552.103 of the Government Code.

We note at the outset that the Public Information Act does not require the preparation of information in the form requested by a member of the public. Open Records Decision No. 145 (1976). In Open Records Decision No. 347 (1982), this office indicated that a governmental body is not required to answer factual questions or to, in effect, respond to legal interrogatories. The Public Information Act applies only to information already transcribed into tangible form. We therefore agree that the district is not required to respond to the twelve interrogatories posed by the requestor.

¹The Public Information Act does not require a governmental body to obtain information not in its possession or to prepare new information in response to a requestor. Open Records Decision No. 445 (1986).

We also note that some of the records you submitted to this office as being responsive to the request are specifically made public under section 552.022 of the Government Code. Section 552.022(a) provides in pertinent part as follows:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, *evaluation*, or investigation made of, for, or by a governmental body, except as provided by Section 552.108. [Emphasis added.]

Some of the submitted documents constitute completed evaluations made public under section 552.022(a)(1). Therefore, the district may withhold those records only if they are made confidential under other law or are excepted from disclosure under section 552.108 of the Government Code. Although you argue that the submitted records are excepted under section 552.103 of the Government Code, this provision is a discretionary exception and therefore is not "other law" for purposes of section 552.022. *See, e.g.,* Open Records Decision Nos. 665 at 2 n.5 (2000) (governmental body may waive section 552.103). Accordingly, we conclude that the district must release the submitted performance evaluations in their entirety.

Although the attorney general will not ordinarily raise an exception that might apply but that the governmental body has failed to claim, *see* Open Records Decision No. 325 at 1 (1982), we will raise section 552.101 of the Government Code, which protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," because the release of confidential information could impair the rights of third parties and because the improper release of confidential information constitutes a misdemeanor. *See* Government Code § 552.352.

Among the documents you submitted to this office is a medical record of a district employee. Section 159.002 of the Medical Practice Act (the "MPA"), which is codified at subtitle B of title 3 of the Occupations Code, provides in pertinent part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

The MPA includes provisions that govern the disclosure of information that it encompasses. *See* Occ. Code §§ 159.003, 159.004, 159.005, 159.006. The release of the medical record, which we have marked, is governed by the MPA. The district therefore may release this document only in accordance with the MPA.

We also note that one of the documents you submitted to this office for review constitutes an Employment Eligibility Verification, Form I-9. Form I-9 is governed by title 8, section 1324a of the United States Code, which provides that the form "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. 8 U.S.C. § 1324a(b)(5); *see* 8 C.F.R. § 274a.2(b)(4). Release of this document under the Public Information Act would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we conclude that Form I-9 is confidential under section 552.101 and may only be released in compliance with the federal laws and regulations governing the employment verification system.

We now address whether the remaining personnel file information is excepted from required public disclosure. Section 552.103 of the Government Code is commonly referred to as the "litigation exception." Under section 552.103(a) and (c), the governmental body raising this exception must demonstrate that (1) litigation involving the governmental body was pending or reasonably anticipated on the date the governmental body received the records request, and (2) the information at issue is related to that litigation.² *See also University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103.

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 (1989) at 5 (litigation must be "realistically contemplated"). In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982), and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

In this instance, the requestor has alleged that the district has committed both libel and slander against his client and has threatened to "pursue punitive damages" against the district unless certain conditions are met. After reviewing the information you submitted to our office, we conclude that you have demonstrated that the district reasonably anticipated

²Although section 552.103 vests the attorney for a governmental body with discretion to determine whether the exception should be claimed, that determination is subject to review by the attorney general; this review is not in the nature of legal representation, but a quasi-judicial function. Open Records Decision No. 551 (1990), 511 (1988).

litigation regarding this matter on the day it received the records request. Furthermore, the requested personnel file and employment application "relate" to that litigation for purposes of section 552.103. Accordingly, we conclude that the district may withhold the remaining submitted personnel file and employment application information pursuant to section 552.103 of the Government Code.

In reaching this conclusion, however, we assume that none of the information in the records at issue has previously been made available to the opposing party in the litigation. Absent special circumstances, once information has been obtained by all parties to the litigation, either through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). To the extent the opposing party has seen or had access to these records, there would be no justification for now withholding such information from the requestor pursuant to section 552.103(a).³

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

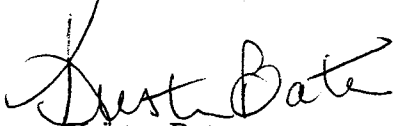
³We also note that the applicability of section 552.103 ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, appearing to read "Kristen Bates".

Kristen Bates
Assistant Attorney General
Open Records Division

KAB/RWP/sdk

Ref: ID# 165232

Enc: Submitted documents

c: Mr. Jesse Gonzalez
The J. Gonzalez Law Firm
3329 North McCall
McAllen, Texas 78501
(w/o enclosures)